D. Wireless Carriers Must Have Access to Building Facilities[20]

Wireless CLECs, like WinStar, need to access inside wiring facilities that will enable them to get from the roof of the building down through the common spaces and pathways (i.e., unused mail chutes, open conduit space, elevator shafts, etc.) to the main Network Interface Device (NID) and ILEC channel bank locations, and then back up through the building's existing wire to each individual customer. For example, if WinStar has a contract to serve a small company which occupies floors 4, 8, and 9 of a 30 story building, WinStar typically would need to run a coaxial cable from its transceiver to its terminating equipment and channel banks and then down to the main NID, typically located on the ground floor or the basement, and then into the ILEC's "66 block" and back up to floors 4, 8, and 9 through the existing wire, as is illustrated by Exhibit V.

The problem faced by wireless CLECs is that access to inside wiring, house riser, and rooftops, in many instances, is not being made available on a reasonable and nondiscriminatory basis. Many building owners are exercising their monopoly power when leasing rooftop space, inside wiring and riser access. Without reasonable access, wireless CLECs effectively are precluded from offering their competitively-priced services to building tenants and residents. As a consequence, tenants have been and will continue to be deprived of a choice of carriers and access to ATS. Furthermore, the cost-savings that are intended to be passed along to the consumer essentially will be redirected toward landlords to cover the inflated charges for rooftop, inside wiring, and house riser access.

---

[20] All references to "building facilities" includes rooftops, house riser, wire, conduit, NID, and alternative pathways.

IV. IF THE FCC INTENDS TO FULFILL THE PROMISE OF LOCAL COMPETITION, IT MUST REQUIRE NONDISCRIMINATORY ACCESS TO INSIDE WIRING, RISER CABLE, AND RELATED FACILITIES

A. Non-discriminatory Access

Rules based on the principle of nondiscrimination will encourage competition and reward carriers for quality services, innovate offerings, competitive rates, rather than rewarding a carrier for getting access. Moreover, the ability of all carriers to obtain nondiscriminatory access will guarantee that tenants have access to their telecommunications carrier of choice. Discriminatory terms, conditions and cost for installation of facilities will result in a de facto choice for the end user tenant. In other words, discriminatory rules that disadvantage one carrier over another will reduce the choices of available CLECs to a tenant. For example, if the rules burden a wireless carrier from gaining reasonable access, then tenants are deprived of choosing a CLEC offering that type of innovative technology and the accompanying advanced services. Furthermore, if the rules permit a building owner to discriminate on compensation, many new entrants without deep pockets may be prohibited from accessing the building and, therefore, the tenant is deprived of choosing that CLEC, which may offer services that meet that tenant's needs. Therefore, to ensure that tenants realize the significant right to choose a CLEC, the FCC should design its rules to require access on a nondiscriminatory basis.

B. Parameters Governing Arrangements with ILECs

The FCC must clearly mandate that all ILEC owner or controlled inside wire, including house riser (both vertical and horizontal), riser conduit, and connector blocks, are immediately available as unbundled elements. New York Telephone is required by the New York Public Service Commission to offer CLECs house and riser cable in multi-tenant buildings on an unbundled basis.

This enables a CLEC to provide its own link to the entrance of a multi-tenant building and to purchase from New York Telephone the house and riser cable within the building.[21]

In accordance with Section 224 of the 1996 Act, the FCC must clarify the CLECs right to obtain use of an ILEC and other utilities' in-building rights of way (as reflected in building easements, licenses, contacts, etc.). To the extent such individual rights of way contain assignability clauses and the like, there is no further issue of the building owner's rights. As demonstrated above, the FCC has authority to mandate nondiscriminatory access to buildings vis-a-vis the building owner. The only constitutional issue is whether the compensation provided to the building owner for the taking of non-rentable space is just.[22] WinStar has previously proposed that the building owner set the proxy. For example, if the building owner charges the ILEC a nominal sum or zero, then the building owner must extend the same charge to all competitive carriers. If the ILEC in the building is paying, then the rate applied to all competitive carriers is constitutionally sufficient. Thus, it is not necessary for the FCC to determine compensation; however, the FCC must require that the building owner apply compensation on a nondiscriminatory and reasonable basis.

In addition to offering building access on an unbundled basis, ILECs must be required to assign a demarcation point at the minimum point of entry (*i.e.*, the closest practical and accessible point to where the ILEC's wire crosses the property line). If the demarcation point is not assigned

---

[21] *Joint Complaint of AT&T Communications of New York, Inc., et al.*, Opinion and Order in Phase 2, Case 95-C-0657, Opinion No. 97-19 (NY PSC, Dec. 22, 1997).

[22] Loretto, *supra*.

in a timely manner (*i.e.*, 30 days), the competitive carrier should be permitted to assign the demarcation point. The ILEC should reconfigure the building facilities on the property, timely and without unreasonable expense, to allow a competitive carrier to make contact via a simple and single cross connect at the NID.

C. Parameters Governing Negotiations and Agreements with Building Owners

The Commission should set the following parameters for negotiations and agreements with building owners to ensure that all competitive carriers receive nondiscriminatory, reasonable access.

First, regulations should prevent building owners from discriminating against a tenant for choosing a competitive carriers. For example, building owners must be prohibited from charging tenants for choosing a competitive service provider.

Second, regulations should prevent building owners from charging competitive providers inflated charges for access. As a practical business matter, the higher costs will result in a decision by a carrier not to provide service to a particular building, despite requests by tenants or higher costs to the tenant to receive that service. Furthermore, if the ILEC receives free access, so should the CLEC. If the building owner requires "reasonable" compensation, that compensation should be applied on a nondiscriminatory basis to all accessing carriers. Finally, it should be *per se* unreasonable for a building owner to receive a percentage of the competitor's gross revenue. Providing a building owner with a percentage of gross revenue defies a cost-based approach to providing service and needlessly raises the cost of service for a competitive carrier possibly forcing the carrier to raise rates, thereby negating a benefit of competition. The benefits of cost-based service should be directed to the tenant, not the building owner.

Third, building owners should be prohibited from entering into exclusive contracts.

Fourth, building owners should provide competitive carriers 24 hour, seven day a week access to the facilities in the event of an emergency.

Fifth, all telecommunications services should be included in the competitive carrier's rights of access. This is where the person's choice of a carrier and associated services offered by that particular carrier demonstrate the benefits of the 1996 Act. There should be no limit to the types of services a customer may request,

5. IN ORDER TO ENABLE WIRELESS CARRIERS LIKE WINSTAR TO COMPETE WITH WIRELINE PROVIDERS ON EQUAL FOOTING, THE COMMISSION SHOULD PROCESS OUTSTANDING APPLICATIONS IN THE 38.6-40.0 GHZ BAND.

In the NOI, the FCC seeks comment on whether the spectrum that has been made available to date is adequate to allow wireless carriers to compete with wireline providers."[23] The FCC also asks whether the government is withholding necessary inputs for ATS, such as spectrum.[24] As noted above, WinStar utilizes radio spectrum to deploy advanced services, including Internet access, Wide Area Network services utilizing frame relay, Internet Protocol and ATM data transport, and private network services, in competition with wireline providers.[25] Although WinStar currently holds a number of LMDS and 38 GHz licenses across the United States, numerous other WinStar applications for 38 GHz spectrum that are ripe for processing have remained pending at the

---

[23] NOI at 43.

[24] *Id.* at 67.

[25] *See* Mark Rockwell, "New Fixed Wireless Players Cut In On Incumbent Telcos – Teleport, Teligent and WinStar Hit the Airwaves," *Internet Week*, at T20 (Mar. 2, 1998) ("The 24 and 38 GHz fixed wireless systems can provide video and voice data at speeds of up to 155 megabits per second, in direct competition with local exchange companies.")

Commission for over four years.[26] This delay hinders WinStar's ability to fully expand its network and compete with LECs and other wireline competitors on an equal footing.[27] Accordingly, the Commission promptly should process these outstanding applications.

VI. WHERE FEASIBLE, SPECTRUM SHARING SHOULD BE EXPLORED; HOWEVER, IN THE UPPER BANDS, SHARING BETWEEN TERRESTRIAL AND SATELLITE SYSTEMS IS NOT PRACTICABLE

---

[26] *See, e.g.,* File Nos. 9404166, 9404167, 9404169, 9404171, 9404173. The courts have signaled their dismay at delays of this type by federal agencies. *See, e.g., TRA v. FCC*, 141 F.3d 1193 (D.C. Cir. 1998).

[27] This is especially true because in the market for Internet access and other data services, "[t]he competition [wireless] companies face is likely to come primarily from fiber-based CLEC networks and increasingly from incumbent carriers upgrading their copper plant with digital subscriber line (DSL) technology." Jason Meyers, "The First Wave," *Telephony*, at 60 (Mar. 30, 1998).

In the NOI, the FCC queries whether wireless deployment of ATS might be significantly advanced by increased spectrum sharing and overlay use.[28] Although WinStar believes that, where feasible, spectrum sharing and overlay use should be explored, sharing between terrestrial fixed services and satellite operations is not practicable in the upper bands, e.g., 28 GHz and 38 GHz. The FCC has already correctly observed that "it is not likely that satellite and terrestrial systems will be able to share the same spectrum without significant technical constraints on the operations of one or the other, or both, types of systems."[32] In support of this conclusion, WinStar and others have submitted numerous pleadings and engineering analyses documenting the significant problems inherent in sharing between terrestrial fixed services and satellite operations.[33] In response, the FCC has acknowledged that where sharing is not feasible, as in the 38 GHz band, band segmentation is the preferred approach.[34] These conclusions should not be revisited in this proceeding.[35]

---

[28] NOI at 74.

[32] *See Allocation and Designation of Spectrum for Fixed-Satellite Services in the 37.5-38.5 GHz, 40.5-41.5 GHz, and 48.2-50.2 GHz Frequency Bands; Allocation of Spectrum to Upgrade Fixed and Mobile Allocations in the 40.5-42.5 GHz Frequency Band, Allocation of Spectrum in the 46.9-47.0 GHz Frequency Band for Wireless Services; and Allocation of Spectrum in the 37.0-38.0 GHz and 40.0-40.5 GHz for Government Operations*, IB Docket No. 97-95, RM-8811, *Notice of Proposed Rulemaking*, 12 FCC Rcd. 10130, at ? 12 (1997)("*Band Plan Notice*").

[33] *See, e.g.*, Attachment to Petition to Deny of WinStar Communications, Inc., File Nos. 157-SAT-P/LA-96(72), 29-SAT-AMEND-97 (Aug. 21, 1997)(demonstrating that sharing is infeasible between terrestrial and satellite operations in the 38 GHz band); Comments of WinStar Communications, Inc., IB Docket No. 97-95, RM 8811, at 3-5 (May 5, 1997); Attachment to Opposition of WinStar Communications, Inc., RM 8811 (June 20, 1996).

[34] *See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz*, ET Docket No. 95-183, RM 8553, PP Docket No. 93-253, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd. 18600, at 8 (1997)("*38 GHz Order*") (concluding that some form of band segmentation will be required in the spectrum above 36 GHz due to the difficulties inherent in sharing between fixed and satellite

VII. THE UNIVERSAL SERVICE SCHOOLS AND LIBRARIES FUND WILL BE INSTRUMENTAL IN ENABLING PRIVATE COMPANIES TO PROVIDE INTERNET ACCESS AND OTHER ADVANCED TELECOMMUNICATIONS CAPABILITY TO SCHOOLS

---

services); *see also Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd. 19005, at ? 44 (1996) (designating discrete spectrum bands for specific services in the 27.5-30.0 GHz band).

[35] *See Amendment to Parts 2, 15, and 97 of the Commission's Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications*, ET Docket No. 94-124, RM 8308, *Memorandum Opinion and Order on Reconsideration and Notice of Proposed Rulemaking*, FCC 98-142, at ? 4 (rel. July 29, 1998) (noting that the FCC should not defer action in proceedings to license specific sub-bands and services pending the outcome of the *Band Plan Notice*).

In response to issues raised with regard to deployment of ATS to elementary and secondary schools and classrooms and the role of private initiatives and government programs, WinStar notes that the Universal Service schools and libraries program promises to assist private companies in providing Internet access and other advanced communications services to America's schoolchildren.[36] In particular, the schools and libraries fund has the potential to ensure that these services are provided to the schools that need them the most – schools in low-income communities.[37]

WinStar's telecommunications and information services, including high-speed wireless Internet access, represent precisely the type of service to satisfy the needs of schools. Because WinStar's wireless service is generally cheaper than its wireline counterparts, WinStar is able to provide more service for the school's money.[38] WinStar has prepared several proposals thus far to

---

[36] NOI at 64.

[37] While 78% of schools in affluent communities have Internet access, only 50% in low-income communities have access. *See* "Bridging the Digital Divide," William E. Kennard, Chairman, Federal Communications Commission, to NAACP Board of Trustees, at 4 (May 15, 1998).

[38] *See* Michael Weingarten and Bart Stuck, "Going the Distance: Point-to-Point and Point-to-Multipoint Wireless Stand Up to Fiber Technology in the Capital Cost Grudge Match – and

provide ATS to schools, including one for the District of Columbia Public Schools.[39] These proposals include not only high-speed Internet access, but also a package of related services including free training, video content, and other related enhancements to the basic Internet service. The full realization of benefits from proposals by private companies such as WinStar cannot be realized without continued Commission commitment to the schools and libraries program.

Win," *Telephony*, at 38-43 (June 1, 1998) (demonstrating with an economic model that broadband wireless is far less costly than selected wireline options).

[39] WinStar submitted its "Proposal for District of Columbia Public Schools: Beyond 1997 . . . Children First" as Appendix A to Comments of WinStar Communications, Inc., CC Docket No. 96-45, DA 98-872 (May 22, 1998).

CONCLUSION

WinStar appreciates the opportunity to inform the FCC of the critical barrier to access that currently stifles true competition in today's telecommunications market and looks forward to working with the FCC to ensure that competitive, advanced services are deployed to all Americans.

Respectfully submitted,

Robert Berger
Russell Merbeth
Barry Ohlson
WinStar Communications, Inc.
1146 19th Street, N.W.
Suite 200
Washington, D.C. 20036

Russell M. Blau
Kathleen L. Greenan
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W. Suite 300
Washington, DC 20007
(202) 424-7500

Counsel for WinStar Communications, Inc.

September 18, 1998